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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-1335

VILLAGE OF SCHAUMBURG, et al.,

Petitioners,

v.

CITIZENS FOR A BETTER
ENVIRONMENT, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AND THE LUTHERAN COUNCIL IN THE U.S.A.

SANFORD JAY ROSEN
ROBIN B. JOHANSEN
ROSEN, REMCHO & HENDERSON
155 Montgomery Street, Suite 1502
San Francisco, California 94104
(415) 433-6830

Attorneys for the Amici Curiae

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The National Council of Churches of Christ in the U.S.A., the Lutheran Council in the U.S.A., and the Baptist

Joint Committee on Public Affairs hereby request leave to file the attached brief amicus curiae in the above-captioned case. The attorney for the respondents has consented to the filing of the attached brief. The consent of the attorneys for the petitioners Village of Schaumburg, et al., was requested but refused. Letters containing respondents' consent and petitioners' refusal have been forwarded to the Court.

INTEREST OF THE AMICI

The organizations requesting leave to file this brief amicus curiae represent major religious groups in the United States. Increasingly, these religious organizations find themselves confronted with statutes or ordinances similar to the Schaumburg ordinance. Many of the ordinances fail to state whether they include solicitation by religious organizations. Some cover only certain types of religious organizations. Others regulate only certain types of fundraising conducted by religious bodies, depending upon the purpose for which the funds will be used. The cumulative burden of these confusing and conflicting regulations has had a crippling effect on religious fundraising in violation of both the Religion and Free Speech Clauses of the First Amendment.

These religious organizations have a particular interest in filing a separate brief because of the special protections afforded them under the Religion Clauses of the First Amendment. Respondents and the other amici curiae supporting them represent primarily secular organizations. Thus, the other amici focus their arguments on the Free Speech clause of the First Amendment. They do not address the special problems of entanglement and interference with religious freedom that these amici seek to bring to the Court's attention.

This brief amicus curiae is filed on behalf of the following religious organizations:

The National Council of Churches of Christ in the U.S.A. is a cooperative agency of thirty-two national Christian religious bodies having an aggregate membership of over forty million. The National Council of Churches is organized exclusively for religious purposes, and by its certificate of incorporation is committed "to promote the application of the law of Christ in every relation of life."

On November 2, 1978, the Governing Board of the National Council of Churches adopted a resolution on "Regulations of Charitable Solicitations" which expressed opposition to solicitation statutes if they did not exempt churches from the necessity to report

to civil officials their income, expenditures, major contributions and chief officers, which the Board considered to be an infringement upon the free exercise of religion.

The Baptist Joint Committee On Public Affairs consists of representatives elected by each of eight cooperating Baptist conventions of the United States: the American Baptist Churches in the U.S.A., the Baptist General Conference, the National Baptist Convention, U.S.A., Inc., the North American Baptist Conference, the Progressive National Baptist Convention, Inc., the Seventh Day Baptist General Conference, and the Southern Baptist Convention. These conventions have a combined membership of more than twenty seven million. Among Baptists, religious liberty is a fundamental and sacred principle. It is the opinion of the Baptist Joint Committee on Public Affairs that this principle is jeopardized by the decision on appeal in this case.

The Lutheran Council in the U.S.A. is a cooperative agency formed in November, 1966. The following three church bodies are in cooperating fellowship with the Office For Governmental Affairs of the Council which has responsibility for the issue of church/government relations:

(1) The American Lutheran Church composed of 4800 congregations

having approximately 2.4 million U.S. members;

(2) The Lutheran Church in America composed of 5800 congregations having approximately 2.9 million members; and

(3) The Association of Evangelical Lutheran Churches composed of 250 congregations having approximately 110,000 U.S. members.

The Lutheran Council is aware of rising concern within its participating church bodies of governmental activity in matters affecting the churches and their ministry.

The brief which these amici curiae seek leave to file argues first that the Schaumburg ordinance is unconstitutionally vague as applied to religious organizations and second, if the ordinance does apply to religious bodies, it violates the Religion Clauses of the First Amendment.

SANFORD JAY ROSEN
ROBIN B. JOHANSEN
ROSEN, REMCHO & HENDERSON
155 Montgomery St., #1502
San Francisco, Ca. 94104
(415) 433-6830

Attorneys for Amici Curiae

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BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS IN THE U.S.A.

INTRODUCTION

This case concerns the degree to which a local government may regulate the solicitation of funds for charitable purposes. The specific issue before the Court is whether a local government may expressly prohibit solicitation by a charitable organization that expends more than 25% of amounts received as contributions on administrative and/or fundraising activities.

The district court held that the statute violated the First Amendment, and the Court of Appeals for the Seventh Circuit affirmed. Citizens for a Better Environment v. Village of Schaumburg, No. 76-C-470 (7th Cir., Dec. 1, 1978). (Petition for Writ of Certiorari, Appendix A.)

Religious organizations have a special interest in the outcome of this case. Unlike other charitable organizations, they can rarely be certain whether they are subject to solicitation regulations at all, because the regulations' coverage is often poorly defined. Indeed, the Court of Appeals in the instant action noted the vagueness with which the Schaumburg ordinance's coverage was defined:

> There is, for example, no express exemption from the charitable solicitation provisions for religious or political campaign canvassing combined with solicitation of funds, although this type of activity is arguably within the section 22-19 broad definition.
>
> Petition for Writ of Certiorari, Appendix A, p. A-8 (footnote omitted).

Application of the Schaumburg ordinance to religious organizations raises First Amendment problems of a different sort than those articulated by respondents and the other amici curiae. The Religion Clauses of the First Amendment narrowly circumscribe the degree to which government may interfere or become entangled with religion.

Although the amici curiae on whose behalf this brief is filed join in the arguments presented in the brief amicus curiae of the Coalition of National Voluntary Organizations, this case raises certain issues that are unique to religious organizations because of the special protections afforded them under the First Amendment. Accordingly, this brief amicus

curiae will address those issues of peculiar concern to religious organizations as they are affected by statutes that regulate charitable solicitation.

INTEREST OF THE AMICI CURIAE

The Interest of the amici is set forth in their Motion for Leave to File this brief.

ARGUMENT

I. The Schaumburg Ordinance Does Not State Clearly Whether Religious Organizations Are Subject To Its Regulation.

Religious organizations increasingly are confronted with state and local regulations that are unconstitutionally vague as to the scope of their coverage. The Schaumburg solicitation ordinance is a case in point. The ordinance defines "Charitable organization" as:

> any benevolent, philanthropic, patriotic, not-for-profit, or eleemosynary group, association or corporation, or such organi-

> zation purporting to be such, which collects and solicits funds for charitable purposes.
>
> Schaumburg Village Code, Ch. 22, Section 22-19.

With perfect circularity, the ordinance defines "charitable purpose" as:

> Any charitable, benevolent, philanthropic, patriotic, or eleemosynary purpose.
>
> Id.

Most religious organizations engage in charitable or philanthropic activities. To fund such activities, many religious organizations rely heavily on the sort of personal solicitation that the Schaumburg ordinance seeks to regulate. Yet the ordinance is silent on its face as to whether religious groups are subject to its coverage. If they are, the ordinance violates both the Free Exercise and Establishment Clauses of the First Amendment. If only certain religious organizations are covered, i.e. those that engage in "charitable" activity as defined by the administrators of the ordinance, the ordinance may violate the Equal Protection Clause of the Fourteenth Amendment as well. No matter how it is interpreted,

in its coverage the ordinance is impermissibly vague, because "men of common intelligence must necessarily guess at its meaning." Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

This ordinance, like countless others throughout the nation, possesses both of the constitutional infirmities that this Court disapproved on vagueness grounds in Hynes v. Mayor of Oradell, 425 U.S. 610 (1976). 1/

First, it is impossible for religious groups to determine whether they are subject to regulation under the Schaumburg ordinance. Indeed, the

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1/ For a comprehensive review of state statutes regulating charitable solicitation, see THE PHILANTHROPY MONTHLY, SURVEY OF STATE LAWS REGULATING CHARITABLE SOLICITATION (Looseleaf, 1978 Rev.). Currently at least five states expressly include religious organizations within their statutes' coverage. Of those five, the North Carolina statute was recently declared unconstitutional under the First, Fifth and Fourteenth Amendments. Heritage Village Church v. North Carolina, No. 77 CVS6460 (N.C. Ct.App. April 3, 1979). In addition a federal magistrate has recommended that the Minnesota statute be struck down for the same reasons. Valente v. Larson, Civ. 4-78-453 (D. Minn., 4th Div., May 3, 1979).

Court of Appeals in the instant case questioned the Village's assertion that the ordinance does not apply to religious groups, stating that such an exclusion "seems inconsistent with the broad definition involved." (Petition for Writ of Certiorari, Appendix A, p. A-8, n. 5.) If the legislative body and the courts cannot agree on the ordinance's coverage, religious organizations "necessarily must guess" as to whether they are subject to regulation. See Connally, supra.

The Schaumburg ordinance also possesses the second infirmity of the ordinance struck down in Hynes: the lack of implementing regulations designed to limit the discretion of the

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1/ (continued) from page 6

In 1947, a local ordinance similar to the Schaumburg ordinance came before this Court in Gospel Army v. Los Angeles, 331 U.S. 432 (1947) and Rescue Army v. Municipal Court, 331 U.S. 549 (1947). Because of the procedural posture of both cases, the Court did not reach the question of the constitutionality of the ordinance. On March 7, 1978, the Superior Court for the City and County of Los Angeles declared the Los Angeles ordinance unconstitutional. The matter is currently pending before the California Court of Appeal. Perlman v. Municipal Court, Civ. No. 54725 (2d App. Dist. Div. One).

individual officials who enforce the ordinance. 425 U.S. at 622. As it now exists, the Schaumburg ordinance permits officials to hold some religious groups subject to regulation while excluding others. For example, Village officials may decide that a local church that operates its own school is subject to the ordinance, while another that lends only occasional financial support to its sick or needy members is not.

The danger, of course, in such discretion is that it invites favoritism of one religious group over another. Conversely, such discretion allows selective enforcement against unpopular religions.

James Madison, in his famous Memorial and Remonstrance Against Religious Assessments, recognized the peril inherent in this kind of official discretion:

> [T]he bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second, an unhallowed

perversion of the means of salvation.

> Madison, "Memorial and Remonstrance Against Religious Assessments," Appendix II to Opinion of Douglas, J., dissenting in Walz v. Tax Comission, 397 U.S. 664, 732 (1970).

II. If Applied to Religious Organizations, the Schaumburg Ordinance And Others Like It Violate the Religion Clauses of the First Amendment.

The Religion Clauses of the First Amendment prohibit government both from interfering with the free exercise of religion and establishing or sponsoring any religion. This Court has noted the tension between the two prohibitions, "either of which, if expanded to a logical extreme, would tend to clash with the other. Walz v. Tax Commission, 397 U.S. 664, 668-69 (1970).

Application of the Schaumburg ordinance, or others like it, to solicitation by religious organizations violates both Religion Clauses of the First Amendment. They violate the Free Exercise Clause by restricting the amounts that religious groups may spend on solicitation and by imposing a cumulative burden of conflicting and

confusing regulations in various jurisdictions across the nation. In this sense, the statutes' constitutional violations are parallel to those suffered by secular charitable organizations, as described in the brief of the Coalition of National Voluntary Organizations.

In the context of religious solicitation, the cumulative burden of these statutes and ordinances echoes this Court's statement about taxation of religious practices:

> Those who can tax the exercise of this religiou practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance.
>
> Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).

As the other amici point out, limits on the amounts that groups may spend for solicitation, as well as other equally burdensome restrictions, may actually preclude charitable solicitation altogether. (Brief amicus curiae on Behalf of The Coalition of National Voluntary Organizations, et al. at 13-19.)

Of course, the interests of religious organizations are not identical to those of non-religious charitable organizations. The Establishment Clause,

provides the "major difference between churches on the one hand and the rest of the nonprofit organizations on the other." Walz v. Tax Commission, 397 U.S. 664, 708 (1970)(Douglas, J. dissenting). Mr. Justice Jackson described the difference in Everson v. Board of Education, 330 U.S. 1, 26 (1947)(Jackson, J. dissenting):

> [A State] may make public business of individual welfare, health, education, entertainment or security. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character . . . . That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom . . . .

As the Coaltion of National Voluntary Organizations brief notes, disclosure and reporting requirements serve as a less restrictive alternative to regulating secular organizations. However, as applied to religious organizations, this alternative, like the Schaumburg ordinance itself, violates the Establishment Clause of the First Amendment.

This case differs from most Establishment Clause cases in that the State is not seeking to aid a religious group but to regulate it. Even so, the regulations of the Schaumburg ordinance, if applied to religious groups, would impermissibly entangle the State in the affairs of the Church.

For purposes of applying its 25% limitation on solicitation expenditures, the Schaumburg ordinance differentiates between funds used for charitable purposes and "administrative expenses of the organization." (Schaumburg Village Code, Ch. 22, Section 22-20(g)). The latter which must be counted within the 25% limitation, include "salaries, attorneys' fees, rents, advertising expenses ... and related expenses incurred as administrative or overhead items." (Id.) Presumably, then, a minister's salary, the mortgage on the church, and even the purchase of hymnals would all be included within the 25% limitation as "administrative expenses." But in order to know whether these items are included in the 25% limitation, the State must make a determination based upon inspection of church records.

This Court has consistently struck down statutes that require state examination of church records and accounts. In Lemon v. Kurtzman, 403 U.S. 602, 620 (1971)(Lemon I), this Court stated:

> In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches.

Just as in Lemon I, application of the Schaumburg ordinance to religious organizations would "involve excessive and enduring entanglement between state and church." 403 U.S. at 619.

In addition to evaluating a church's "administrative expenses," the State might find it necessary to examine other books and records in order to determine whether the church was soliciting for a "charitable purpose" that would make it subject to the statute. A similar prospect involving state aid to parochial schools recently led this Court to overturn a New York statute, stating:

> In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment ... the State ... would have to undertake a search for religious meaning in every classroom examination offered in support of a claim.
>
> New York v. Cathedral Academy, 434 U.S. 125, 132-33 (1977).

Finally, the State might find it necessary to inquire into the good faith of church officials who assert that certain expenses are for charitable, as opposed to administrative, purposes. Only recently, this Court stated that such an inquiry may violate the First Amendment. National Labor Relations Board v. The Catholic Bishop of Chicago, ___ U.S. ___, 47 U.S.L.W. 4283 (March 21, 1979). In discussing the applicability of the National Labor Relations Act to religious schools, the Court noted that the Board might be called upon to determine unfair labor practice disputes in which the schools defended their practices on the basis of their religious creed:

> The resolution of such charges by the Board, in many instances,

> will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions.
>
> 47 U.S.L.W. at 4286-87.

Whether the issue is one of determining whether a group has a religious or a charitable purpose, or simply a matter of disclosure of amounts spent on solicitation, the Establishment Clause will not permit government inspection and evaluation of church books and records. To do so would create the kind of "intimate and continuing relationship between church and state" that this Court held was forbidden in Lemon I. 403 U.S. at 622.

CONCLUSION

Like Mr. Justice Harlan, we recognize "that it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern

their application" Walz v. Tax Commission, 397 U.S. 664, 694 (1970) Harlan, J. concurring). 397 U.S. 664, 694 (1970)(Harlan, J. concurring). In this instance, at least, it is clear that application to religious groups of the Schaumburg ordinance or the thousands like it across the country, violates the very purpose that underlies both clauses.

For these reasons, and for those stated in the brief amicus curiae of the Coalition of National Voluntary Organizations, et al., the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

SANFORD JAY ROSEN
ROBIN B. JOHANSEN
ROSEN, REMCHO & HENDERSON
155 Montgomery Street
Suite 1502
San Francisco, California
94104
(415) 433-6830

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Attorneys for the Amici Curiae